UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRIAN FARRINGTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 01-274-P-H***
	)	
BATH IRON WORKS CORPORATION,	***)***	
	)	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON PARTIES' MOTIONS TO STRIKE AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Bath Iron Works Corporation ("BIW") moves for summary judgment as to all claims against it in this action alleging that plaintiff Brian Farrington was subjected to a hostile work environment based on disability, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., and the Rehabilitation Act, 29 U.S.C. § 701 *et seq*. Bath Iron Works Corporation's Motion for Summary Judgment, etc. ("S/J Motion") (Docket No. 19) at 1; First Amended Complaint and Demand for Jury Trial ("Complaint") (Docket No. 13) ¶ 1.[1] In related motions, both BIW and Farrington move to strike portions of each other's summary-judgment evidence. Plaintiff's Motion To Strike Portions of Paragraph 6 and Paragraphs 7 and 8 of Affidavit

[1] BIW's amended complaint names four individuals as defendants in addition to BIW and contains fifteen counts. *See generally* Complaint. However, the court granted a motion to dismiss all of the individual defendants and all Maine Human Rights Act claims. *See* Endorsement to Defendants' Motion To Dismiss, etc. (Docket No. 3). Only two counts remain: Count I, alleging violation of the ADA by BIW, and Count XI, alleging violation of the Rehabilitation Act by BIW. *See generally* Complaint.

of Maria E. Mazorra, M.D., etc. ("Plaintiff's Motion To Strike") (Docket No. 32); Bath Iron Works Corporation's Motion To Strike the Affidavits of Ronald Emmons and Bruce Briggs in Their Entirety ("Defendant's Motion To Strike") (Docket No. 46). For the reasons that follow, I grant Farrington's motion to strike, grant in part and deny in part BIW's motion to strike and recommend that BIW's motion for summary judgment be denied with one caveat: that Farrington be precluded from claiming at trial disability premised on asserted substantial restriction in his ability to work.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation

omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Context

A. Motions To Strike; Other Evidentiary Objections

Before laying out the contours of facts relevant to this recommended decision, I resolve the parties' motions to strike, as well as certain of BIW's additional objections to specific statements of facts, as follows:

1. **Plaintiff's Motion To Strike:** Granted. In issue are the second, third and fourth sentences of paragraph 6 of the affidavit of Maria E. Mazorra, M.D., as well as the entirety of paragraphs 7 and 8. *See* Plaintiff's Motion To Strike at 1; Affidavit of Maria E. Mazorra, M.D. ("Mazorra Aff."), Tab 2 to Defendant BIW's Exhibits to Statement of Material Facts – Vol. II ("BIW Exhibits/Vol. II"), filed with Bath Iron Works Corporation's Statement of Material Facts [as] to Which There Is No Dispute ("Defendant's SMF") (Docket No. 20), ¶¶ 6-8. The Mazorra affidavit is made on "personal knowledge, information and belief." Mazorra Aff. at 2. That is not fatal to admissibility to the extent the statements in issue clearly can be discerned to have been made on personal knowledge. *See, e.g., Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 38 n.5 (D. Me. 1994) ("[I]f it is clear that the affidavit statements are made on the basis of the affiant's personal knowledge, they satisfy the requirements of Rule 56(e), regardless of a blanket recitation stating otherwise."). However, in this case, it is (i) not clear whether the relevant portions of paragraph 6 were made on personal knowledge and (ii) clear that paragraphs 7 and 8 were not. *See* Mazorra Aff. ¶¶ 6-8. The statements in issue accordingly are stricken. *See Perez v. Volvo Car Corp.*, 247 F.3d

303, 315 (1st Cir. 2001) ("It is apodictic that an affidavit . . . made upon information and belief . . . does not comply with Rule 56(e).") (citation and internal quotation marks omitted).

2. **Defendant's Motion To Strike:** Granted in part, denied in part. Although BIW asks that the Emmons and Briggs affidavits be stricken in their entirety, *see* Defendant's Motion To Strike at 1, it objects to discrete portions: (i) Emmons' statement that he heard Farrington called "retard" and (ii) Emmons' and Briggs' averments that they believe Farrington was "subjected to a disproportionate number of practical jokes and physical assaults because other co-workers knew that he was or perceived him to be substantially limited in his intellectual functioning," *see id*. at 2-3; Affidavit of Bruce Briggs ("Briggs Aff.") (Docket No. 30) ¶ 4; Affidavit of Ronald Emmons ("Emmons Aff.") (Docket No. 33) ¶¶ 2-3. I grant BIW's motion as it pertains to these portions. Emmons' statement in his affidavit that he heard Farrington called "retard" directly contradicts his previous, sworn deposition testimony without explanation for the discrepancy. *Compare* Emmons Aff. ¶ 2 *with* Transcript of Proceedings, *In re: Brian Farrington* (Me. Human Rights Comm'n July 10, 2000) ("MHRC Transcript"), Tab 10 to Defendant BIW's Exhibits to Statement of Material Facts – Vol. I ("BIW Exhibits/Vol. I"), filed with Defendant's SMF, at 103 (Emmons testimony); *see also, e.g., Torres v. E. I. DuPont de Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. 2000) ("It is settled that when an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.") (citations and internal punctuation omitted). Paragraph 3 of the Emmons affidavit and paragraph 4 of the Briggs affidavit are conclusory, lack foundation for the basis of the opinions offered and indicate on their face that they emanate from belief rather than personal knowledge. *See* Briggs Aff. ¶ 4; Emmons Aff. ¶ 3. These discrete portions of the Emmons and Briggs affidavits accordingly are stricken. To the extent

BIW asks the court to strike the remaining portions (as to which it articulates no specific objection), the motion is denied. *See, e.g., Perez*, 247 F.3d at 315 (noting that application of Rule 56(e) "requires a scalpel, not a butcher knife. The *nisi prius* court ordinarily must apply it to each segment of an affidavit, not to the affidavit as a whole.").[2]

3. **Defendant's Evidentiary Objections to Specific Statements of Facts:** Granted in part, denied in part. BIW also asks that the court disregard a number of Farrington's specific statements of material facts. *See* Bath Iron Works Corporation's Reply to Plaintiff's Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply SMF") (Docket No. 45) at 1-2; *see also generally* Plaintiff's Reply to Defendant's Statement of Material Facts and Plaintiff's Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposing SMF") (Docket No. 29).[3] I grant these requests in part and disregard the following paragraphs of the Plaintiff's Additional SMF:

1. 153 and 179, on the basis of lack of any record citation. *See* Loc. R. 56(c) & (e).

2. 1, 12, 177-78, 180-84 and 187, on the basis that, although they are supported by "admissions on file," *see* Fed. R. Civ. P. 56(c), s*ee also generally* Plaintiff's Responses to Defendants' Requests for Admissions, Tab 16 to BIW Exhibits/Vol. I, such admissions must themselves be admissible, *see, e.g*., 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2722, at 375, 377 (1998) ("Rule 56(c) also permits the court to

[2] In his opposition to BIW's motion to strike, Farrington conditionally moves to strike portions of certain affidavits submitted by BIW in support of its motion for summary judgment, arguing that if the Emmons and Briggs affidavits are found to suffer from the defects of conclusoriness and lack of foundation and/or personal knowledge, portions of the BIW affidavits should be stricken on that basis as well. *See* Plaintiff's Opposition to Bath Iron Works Corporation's Motion To Strike the Affidavits of Ronald Emmons and Bruce Briggs in Their Entirety and Plaintiff's Motion To Strike Certain Paragraphs of the Affidavits of Wayne Fournier, Kevin Jones, Kevin Mower, and Harold Plourde Affidavits If Defendant's Motion Is Granted (Docket No. 52) at 3. Any argument that the Fournier *et al*. affidavits should be stricken should have been, but was not, asserted in Farrington's opposition to the summary judgment motion or in his related motion to strike. It therefore comes too late. The conditional motion is on that basis denied.

[3] I will refer to the plaintiff's separately numbered statement of additional facts, which begins on page 24 of the same (*continued on next page*)

consider any 'admissions on file.' . . . The admission must be in a form that is admissible in evidence.") (footnotes omitted), and in this case they are not. The unsworn statements in issue, referenced in the above-cited paragraphs of the Plaintiff's Additional SMF to prove the truth of the matter asserted, constitute hearsay. *See* Fed. R. Evid. 801(c). While hearsay admissions are admissible if offered against the maker of the statements in question, they are not admissible if offered by the maker (in this case, Farrington). *See* Fed. R. Evid. 801(d)(2); 30B Michael H. Graham, *Federal Practice & Procedure* § 7015, at 172 n.2 (2000) ("Obviously, a prior statement of a party offered *by* that party is not an admission of a party-opponent.") (emphasis in original).

3. 13, 44, 53-54, 103 and 116, on the basis that they derive from inadmissible hearsay. *See, e.g., Burrell v. Hampshire County*, 307 F.3d 1, 6 n.3 (1st Cir. 2002) ("hearsay evidence inadmissible at trial cannot be considered on a motion for summary judgment").

4. 16, 20 and 26, to the extent that Farrington speculates as to what supervisors believed or heard; 41 to the extent it is asserted that Brian LeClair condoned certain conduct; 110, to the extent based on speculation as to what people knew; 169, to the extent that it speculates that Ray Carter was going to fire an employee; 215, to the extent based on speculation that BIW had no reason to doubt Farrington was under stress; and 54, 63, 170 and 213, which are based solely on speculation. *See, e.g., Hodgens v. General Dynamics Corp*., 144 F.3d 151, 167 (1st Cir. 1998) (non-movant may not rest "merely upon conclusory allegations, improbable inferences, and unsupported speculation" to avoid summary judgment) (citation and internal quotation marks omitted).

5. The first sentence of 216, on the basis that it is conclusory. *See, e.g., Hodgens*, 144 F.3d at 167.[4]

document, as "Plaintiff's Additional SMF."

[4] I also disregard paragraph 206 of the Plaintiff's Additional SMF on the basis that it is supported solely by portions of the Emmons and Briggs affidavits that I have stricken.

BIW's request to disregard specific statements of the Plaintiff's Additional SMF is otherwise denied.

B. Facts

With these preliminary issues resolved, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following facts relevant to this recommended decision:[5]

BIW hired Farrington in 1985 to work as a grinder. Defendant's SMF ¶ 1; Plaintiff's Opposing SMF ¶ 1. He currently works as a tinsmith and receives an hourly pay rate of $17.12. *Id.*[6] On or about December 5, 1994 Farrington moved to BIW's East Brunswick Manufacturing Facility ("EBMF") in East Brunswick, Maine. *Id.* ¶ 2.

On or about October 27, 1999 Farrington received a formal, verbal counseling from his supervisor, Brian LeClair, for failing to follow LeClair's orders. *Id.* ¶ 3. Upon leaving the counseling session, Farrington saw a picture of himself posted on a bulletin board in which he was depicted kissing a monkey. Plaintiff's Opposing SMF ¶ 4; Deposition of Brian Farrington ("Farrington Dep."), Tab 6 to BIW Exhibits/Vol. I, at 117-18, 271. At his deposition, Farrington described this as "the end of the straw." Plaintiff's Opposing SMF ¶ 4; Farrington Dep. at 118. Farrington went to BIW's Medical Department, where he alleged that he had been harassed by his co-workers and supervisors at EBMF. Defendant's SMF ¶¶ 4-5; Plaintiff's Opposing SMF ¶¶ 4-5. That day he went out of work, claiming stress. *Id.* ¶ 7. He remained out of work until March 2000, during which time he treated with a psychiatrist (Luke W. Ballenger, M.D.) for anxiety. Plaintiff's

[5] Farrington's recitation of alleged incidents of harassment goes on at some length. *See* Plaintiff's Additional SMF ¶¶ 21-170. Consideration of the entire universe of alleged incidents is unnecessary to resolution of the instant motion; hence, in the interest of brevity, I have set forth only a select number.

[6] BIW's further statement that Farrington "has become proficient in the trade classifications of painter and tinsmith" is disregarded inasmuch as it is neither admitted nor supported by the citations given.

Additional SMF ¶ 173; Defendant's Reply SMF ¶ 173; *see also* Farrington Dep. at 58; Deposition of Luke W. Ballenger, M.D. ("Ballenger Dep."), Tab 1 to Plaintiff's District of Maine Local Rule 26(c) List of Documents ("Plaintiff's Documents"), filed with Plaintiff's Opposing SMF, at 15.

BIW conducted a thorough investigation into all of Farrington's claims of disability-related hostile environment and found no evidence of co-worker or supervisor disability discrimination. Defendant's SMF ¶ 109; Affidavit of Patrick N. Conley ("Conley Aff."), Tab 1 to BIW Exhibits/Vol. II, ¶¶ 12-13.

Farrington filed a Maine Human Rights Commission ("MHRC") complaint on April 20, 2000 alleging hostile-environment disability discrimination. Defendant's SMF ¶ 8; Plaintiff's Opposing SMF ¶ 8. The MHRC conducted a recorded investigatory hearing on July 10, 2000. *Id.* ¶ 9. Although the MHRC hearing was not completed, Farrington nonetheless filed the instant complaint after he requested a right-to-sue letter. *Id.* ¶ 10. He alleges hostile-environment disability discrimination by BIW supervisors and co-workers in violation of the ADA and the Rehabilitation Act. *Id.* ¶ 11. He alleges he was harassed by co-workers and supervisors at EBMF and in the main yard at BIW because of his alleged disability of mental retardation. *Id.* ¶ 12.

Farrington dropped out of school in the 10th or 11th grade. Plaintiff's Additional SMF ¶ 2; Farrington Dep. at 68. He subsequently went to work for his father doing repetitive work turning purses inside out. Plaintiff's Additional SMF ¶ 3; Defendant's Reply SMF ¶ 3. Thereafter, he went to work for his old baseball coach as a grinder at Androscoggin Die. *Id.* ¶ 4. At BIW, Farrington's work has always been repetitive and has involved simple tasks. Plaintiff's Additional SMF ¶ 6;

Plaintiff Brian Farrington's Answers to Defendant's First Set of Interrogatories ("Plaintiff's Interrog. Ans."), Tab 5 to Plaintiff's Documents, ¶ 5, at 8.[7]

Although Farrington was classified as a grinder, he initially only emptied trash cans, then began doing chipping and grinding. Plaintiff's Additional SMF ¶ 7; Farrington Dep. at 22-23. He advanced through four grades of the trade of grinder at BIW from September 28, 1987 to April 16, 1990 at rates of pay increasing from $6.00 to $11.63 per hour. Defendant's Reply SMF ¶ 7; Bath Iron Works Corporation Employee History, Exh. J to Conley Aff., at Bates Nos. 10586-87.[8] When Farrington transferred to EBMF, he continued to work as a grinder until he changed classifications to tinsmith. Plaintiff's Additional SMF ¶ 8; Farrington Dep. at 20. He was expected to read blueprints. Plaintiff's Additional SMF ¶ 11; Farrington Dep. at 130. He told supervisor LeClair that he was "very slow." Plaintiff's Additional SMF ¶ 14; Farrington Dep. at 175.[9] He also advised co-workers Ronald Emmons and Ralph Caron that he was slow. Plaintiff's Additional SMF ¶ 15; Defendant's Reply SMF ¶ 15.

Farrington had considerable trouble doing his work putting headboards and footboards, as well as foundations, together. Plaintiff's Additional SMF ¶ 17; Deposition of Ronald Emmons ("Emmons Dep."), Tab 5 to BIW Exhibits/Vol. I, at 40-45, 69; Farrington Dep. at 131. He would have to put them together and pull them apart as many as four times. *Id.*[10] Supervisors and

[7] BIW denies this statement, *see* Defendant's Reply SMF ¶ 6; however, for purposes of summary judgment, I accept Farrington's version as true.

[8] BIW's reference to an "$11.47" hourly rate, Defendant's Reply SMF ¶ 7, evidently is a typographical error.

[9] To the extent that BIW denies that Farrington's citation supports the statement given, *see* Defendant's Reply SMF ¶ 14, I disagree. To the extent BIW denies the statement itself, *see id*., I credit it for purposes of summary judgment.

[10] BIW's attempted qualification that "Farrington experienced no greater trouble in assembling headboards, footboards and foundations than other tinsmiths at EBMF," Defendant's Reply SMF ¶ 17, is disregarded inasmuch as it is not fairly supported by the citations given. BIW elsewhere does adduce cognizable evidence that (i) "Farrington's co-workers observed that Farrington had the skills necessary to accomplish his tinsmith duties successfully," Defendant's SMF ¶ 50; Affidavit of Harold Joseph Plourde, Tab 7 to BIW Exhibits/Vol. II, ¶ 18; Deposition of David W. Pass ("Pass Dep."), Tab 11 to BIW Exhibits/Vol. I, at 43-44, and (ii) others besides Farrington had occasional difficulty assembling work orders, *see* Defendant's SMF ¶ 60; Plaintiff's Opposing SMF ¶ 60. However, Farrington's cognizable evidence, as a
(*continued on next page*)

employees would laugh at Farrington's inability to put things together. Plaintiff's Additional SMF ¶ 18; Emmons Dep. at 45, 69. Emmons testified that there was a great deal of laughing and joking at EBMF. Defendants' Reply SMF ¶ 18; MHRC Transcript at 66.[11] LeClair moved Farrington to a work station directly in front of the supervisor's office, where Farrington worked from approximately 1997 to 1999. Plaintiff's Additional SMF ¶¶ 19-20; Farrington Dep. at 45, 48-49. Farrington's supervisor had received complaints from the person who worked beside Farrington that Farrington's radio was bothering him. Defendant's Reply SMF ¶ 19; MHRC Transcript at 177.

LeClair called Farrington "dumb," "stupid," "retard" and "loser" on a daily basis. Plaintiff's Additional SMF ¶ 21; MHRC Transcript at 15-16.[12] Co-workers Dave Pass, Rick Dennis and Kevin Jones referred to Farrington as "retard." Plaintiff's Additional SMF ¶ 22; MHRC Transcript at 17. Co-worker Dick Kanaris called Farrington "stupid." Plaintiff's Additional SMF ¶ 22; MHRC Transcript at 16. Roland Roy called Farrington an "idiot," "stupid" and "dummy." Plaintiff's Additional SMF ¶ 22; Deposition of Brian LeClair, Tab 9 to BIW Exhibits/Vol. I, at 83. Dick Grondin, Pass and Norman Dupuis referred to Farrington as "the dummy." Plaintiff's Additional SMF ¶ 22; Farrington Dep. at 195. Dick Kanaris and Pass referred to Farrington as "dumb." Plaintiff's Additional SMF ¶ 22; Deposition of Richard Beauchesne ("Beauchesne Dep."), Tab 2 to BIW Exhibits/Vol. I, at 98.

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whole, raises a triable issue whether his difficulties were noticeably greater and/or evoked a different response than those of his co-workers.

[11] BIW's further attempted qualification that "Farrington was not treated any differently than other employees when he made a mistake in his work," Defendant's Reply SMF ¶ 18, is disregarded inasmuch as it is not supported by the citation given.

[12] BIW denies this, *see* Defendant's Reply SMF ¶ 21; however, for purposes of summary judgment, I view the record in the light most favorable to Farrington.

Kanaris would call Farrington "loser" whenever Farrington put things together incorrectly. Plaintiff's Additional SMF ¶ 24; Beauchesne Dep. at 51.[13] Employees would scream at Farrington, "Put it together, take it apart." Plaintiff's Additional SMF ¶ 25; MHRC Transcript at 17. Farrington was the only employee who was called "loser." Plaintiff's Additional SMF ¶ 28; Beauchesne Dep. at 51.[14] No other employees were called "dumb" or "stupid." Plaintiff's Additional SMF ¶ 28; Emmons Dep. at 48. LeClair never referred to Caron as "dumb," "stupid," "retard" or "loser," nor did any other supervisor. Plaintiff's Additional SMF ¶ 28; Deposition of Ralph Caron ("Caron Dep."), Tab 4 to BIW Exhibits/Vol. I, at 82. Caron never saw Pass refer to anyone else as "loser," using the "L" sign, besides Farrington. Plaintiff's Additional SMF ¶ 28; Caron Dep. at 94-95.

LeClair and Farrington's co-workers, including Pass, Kanaris and Tony Richardson, repeatedly teased Farrington about his speech, telling him to take his penis out of his mouth when he spoke. Plaintiff's Additional SMF ¶ 29; Farrington Dep. at 184. Calling someone "dumb," "stupid," "loser" or "retard" would violate BIW's policies regarding respect and dignity and its rules of ethics. Plaintiff's Additional SMF ¶ 30; Deposition of Stephen Allen ("Allen Dep."), Tab 1 to BIW Exhibits/Vol. I, at 167; Deposition of Rene Beliveau ("Beliveau Dep."), Tab 3 to BIW Exhibits/Vol. I, at 84-85.

For at least two to three years prior to October 27, 1999, co-workers struck Farrington, initially occasionally but then on virtually a daily basis, with painters' sticks and pipes. Plaintiff's Additional SMF ¶¶ 31-32; Farrington Dep. at 89; Emmons Dep. at 28.[15] The so-called "painters' stick" was two to four feet long and three-quarters by three-quarters inches. Plaintiff's Additional

[13] Pass stated that he called Farrington a "loser" in connection with Farrington's gambling losses. Defendant's Reply SMF ¶ 24; Pass Dep. at 83-84.

[14] BIW denies that Farrington alone was called "loser," Defendant's Reply SMF ¶ 28; however, for purposes of summary judgment, I accept Farrington's version of this fact.

SMF ¶ 38; Defendant's Reply SMF ¶ 38. On one occasion, LeClair himself struck Farrington with a mallet or hammer. Plaintiff's Additional SMF ¶ 34; Farrington Dep. at 89-90.[16] On other occasions Farrington's co-workers would knock him down and kick him. Plaintiff's Additional SMF ¶ 37; MHRC Transcript at 152. Farrington would not have to do anything to provoke the beatings. Plaintiff's Additional SMF ¶ 40; Beauchesne Dep. at 62; MHRC Transcript at 80.[17]

The beatings of Farrington drew blood and raised welts. Plaintiff's Additional SMF ¶ 49; Farrington Dep. at 93. BIW has a zero-tolerance policy for laying hands on another individual, which would include hitting another individual. Plaintiff's Additional SMF ¶ 55; Defendant's Reply SMF ¶ 55. No other employees were beaten with a stick or pipe at BIW. *Id*. ¶ 60.

Farrington did not report these alleged beatings to the union, nor did he report to BIW's Medical Department when he allegedly received bruises, welts or had blood drawn as a result of being struck. Defendant's SMF ¶ 85; Plaintiff's Opposing SMF ¶ 85. However, Farrington denies that he did not report the beatings to management. Plaintiff's Opposing SMF ¶ 85; Plaintiff's Interrog. Ans. ¶ 7, at 10 (complaint to supervisor Bob Ater); Farrington Dep. at 145 (complaint to Bob Lally that "[t]hey are chasing me and hitting me"). In any event, Brian LeClair, Steve Allen, Bob Ater and Bob Lally were all aware of the assaults. Plaintiff's Opposing SMF ¶ 85; MHRC Transcript at 83-86. Bruce Briggs testified that "people can do anything they want to Farrington it

[15] BIW notes that "Farrington's original sworn testimony states that he was beaten daily for six years." Defendant's Reply SMF ¶ 31. This goes to Farrington's credibility, which is not weighed on summary judgment.

[16] BIW denies that this event transpired, *see* Defendant's Reply SMF ¶ 34; however, for purposes of summary judgment I accept Farrington's version. BIW also notes that Farrington's testimony regarding this event is not corroborated, *see id*.; however, it need not be to raise a triable issue on summary judgment, *see, e.g., Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 53 (1st Cir. 2000) ("[A] party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment.") (citations and internal quotation marks omitted).

[17] To the extent BIW denies that the Beauchesne testimony supports the fact asserted, *see* Defendant's Reply SMF ¶ 40, I disagree. BIW also points out that the Emmons MHRC testimony upon which Farrington relies is contradicted by his later deposition testimony, *see id*.; however, this observation goes to the weight, rather than the admissibility, of the earlier statement.

seems like, and it's a big joke. . . . They figured they were going to get away with it." Plaintiff's Opposing SMF ¶ 85; MHRC Transcript at 49.

On one occasion when LeClair saw Kanaris striking Farrington with a stick or mop, he handed Kanaris a broom and said, "Don't stop on my account." Plaintiff's Additional SMF ¶ 41; Emmons Dep. at 25; Farrington Dep. at 273. On other occasions, management (including LeClair and Allen) would walk by while Farrington was being struck with a stick or a pipe and more often than not fail to intervene. Plaintiff's Additional SMF ¶ 42; Emmons Dep. at 86-87. Even when Farrington complained, management did nothing. Plaintiff's Additional SMF ¶ 42; MHRC Transcript at 143-44.[18] On occasion when LeClair witnessed individuals beating Farrington, he would walk by and laugh. Plaintiff's Additional SMF ¶ 45; Emmons Dep. at 25.[19] Supervisor Bob Ater saw the beatings and asked Farrington how he could put up with all the harassment. Plaintiff's Additional SMF ¶ 46; MHRC Transcript at 69-70, 89.[20]

A picture depicting Farrington with a penis in his mouth was passed around the shop to co-workers and even to Allen and LeClair. Plaintiff's Additional SMF ¶ 62; Farrington Dep. at 119. Co-worker Richard Beauchesne testified that Rick Dennis created this picture by obtaining Farrington's badge and then altering the picture on the internet. Plaintiff's Additional SMF ¶ 64; Defendant's Reply SMF ¶ 64. Bob Lally, as plant manager and later director of operations at EBMF, should have been informed about such pictures but no one ever told Lally about them. *Id*. ¶ 66.

[18] To the extent that BIW denies that (i) Farrington reported the alleged beatings or (ii) supervisors failed to intervene, *see* Defendant's Reply SMF ¶ 42, I view the record in the light most favorable to Farrington for purposes of summary judgment.

[19] BIW denies that LeClair witnessed beatings, *see* Defendant's Reply SMF ¶ 45; however, I view the record in the light most favorable to Farrington.

[20] BIW denies this statement, *see* Defendant's Reply SMF ¶ 46; however, I view the record in the light most favorable to Farrington.

Beauchesne testified that he did not regard a picture of Farrington with a penis in his mouth as "good natured." Plaintiff's Additional SMF ¶ 72; Defendant's Reply SMF ¶ 72. No one else was pictured with a penis in his mouth. Plaintiff's Additional SMF ¶ 73; Beauchesne Dep. at 80; Beliveau Dep. at 81.[21] A picture depicting Farrington marrying a co-worker, Henry Verville, was posted a month or two before Farrington went out of work for stress in October 1999. Plaintiff's Additional SMF ¶¶ 74-75; Defendant's Reply SMF ¶¶ 74-75.

A picture was posted at EBMF on October 27, 1999, the day Farrington went out of work, of Farrington kissing a monkey, inscribed, "BF in Jungle Love" and "I wonder if she'll marry me." Plaintiff's Additional SMF ¶ 80; Farrington Dep. at 117-18; Allen Dep. Exh. 4, Tab 7 to Plaintiff's Documents. Another picture of Farrington kissing a monkey, with "BF" written in the bottom left-hand corner, also was posted in the plant. Plaintiff's Additional SMF ¶ 81; Defendant's Reply SMF ¶ 81. Another picture of Farrington with his face pasted on the body of a monkey was posted at the plant. Plaintiff's Additional SMF ¶ 84; Pass Dep. at 100-01.[22] Another picture was posted on the bulletin board of Farrington's face pasted on a woman's body. Plaintiff's Additional SMF ¶ 89; Defendant's Reply SMF ¶ 89. A picture of monkeys in wedding apparel with Farrington's face superimposed on one of the monkeys was posted in the plant. *Id*. ¶ 90.

Farrington did not engage in horseplay other than verbally joking with his co-workers. Plaintiff's Additional SMF ¶ 199; Farrington Dep. at 27.[23] Farrington denies that he repeatedly referred to his co-workers with epithets concerning their intelligence, distributed degrading pictures

[21] BIW denies this statement, *see* Defendant's Reply SMF ¶ 73; however, for purposes of summary judgment I view the record in the light most favorable to Farrington.

[22] BIW denies that the citations given support Farrington's statement. *See* Defendant's Reply SMF ¶ 84. While the Beliveau testimony does not, the Pass testimony does.

[23] BIW denies this, asserting that Farrington was not harassed on the basis of disability but rather instigated the majority of the horseplay at EBMF, treating work like a schoolyard, *see* Defendant's Reply SMF ¶ 199; *see also, e.g*., Defendant's SMF ¶¶ 25, 64-82. For purposes of summary judgment, I accept Farrington's conflicting version of his role (or lack

(*continued on next page*)

of employees, dumped garbage on them or threw pies in their faces. Plaintiff's Additional SMF ¶ 200; Affidavit of Brian Farrington (Docket No. 37) ¶ 11.[24] One co-worker testified that Farrington was the butt of more jokes than anyone else on the crew. Plaintiff's Additional SMF ¶ 202; MHRC Transcript at 49. When this occurred, "everyone laugh[ed], and they [got] commended for it or praised for it." Plaintiff's Additional SMF ¶ 203; MHRC Transcript at 49. Farrington was treated much worse than anyone was ever treated at EBMF. Plaintiff's Additional SMF ¶ 204; Emmons Dep. at 64, 94-95.

Carlyle B. Voss, M.D., diagnosed Farrington as mildly mentally retarded. Plaintiff's Additional SMF ¶ 174; Voss Dep. Exh. 4, Tab 11 to Plaintiff's Documents, at 14.[25] Without performing any testing, Dr. Ballenger diagnosed Farrington as having borderline intellectual functioning. Plaintiff's Additional SMF ¶ 175; Ballenger Dep. at 95. After conducting the Wechsler Adult Intelligence test and the Woodcock-Johnson Tests of Achievement – Revised, Margaret M. Zellinger, Ph.D., concluded that although Farrington could be classified as mentally retarded, she conservatively would assess him as having borderline intellectual functioning. Plaintiff's Additional SMF ¶ 176; Deposition of Margaret M. Zellinger, Ph.D. ("Zellinger Dep."), Tab 15 to BIW Exhibits/Vol. I, at 76-77.

Farrington is also unable to engage in any significant written communication. Plaintiff's Additional SMF ¶ 186; Plaintiff's Interrog. Ans. ¶ 29, at 17.[26] Farrington was able to write his own

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thereof) as true.

[24] BIW tells quite a different story, *see* Defendant's Reply SMF ¶ 200; however, for purposes of summary judgment I credit that of Farrington.

[25] To the extent BIW denies that Dr. Voss made this diagnosis, *see* Defendant's Reply SMF ¶ 174, I disagree. While Dr. Voss relied on testing and test interpretation by psychologists, *see* Deposition of Carlyle Voss, M.D. ("Voss Dep."), Tab 14 to BIW Exhibits/Vol. I, at 9, 11, he adopted those findings, melding them into his own diagnosis, *see* Voss Dep. Exh. 4 at 14. To the extent BIW disagrees with the diagnosis, *see* Defendant's Reply SMF ¶ 174; *see also, e.g*., Defendant's SMF ¶ 19, I view the record in the light most favorable to Farrington.

[26] BIW denies that Farrington's mental impairment significantly affects his ability to read, write, learn or function in general, *see* Defendant's Reply SMF ¶ 186; *see also, e.g*, Defendant's SMF ¶¶ 16-23, 29-31; however, for purposes of (*continued on next page*)

checks, but gave over this function to his wife because of stress. Defendant's SMF ¶ 32; Plaintiff's Opposing SMF ¶ 32. However, he was unable to keep his checkbook balanced, resulting in cancellation of his account. Plaintiff's Opposing SMF ¶ 32; Farrington Dep. at 215-16. Farrington holds a valid driver's license and motorcycle license and is able to read and obey traffic signs. Defendant's SMF ¶ 45; Plaintiff's Opposing SMF ¶ 45.

Farrington's intellectual-functioning impairment is permanent and severe, placing him overall at a full-scale IQ of 68, which is at the bottom second or third percentile. Plaintiff's Additional SMF ¶ 189; Defendant's Reply SMF ¶ 189. One's full-scale IQ does not indicate one's level of functioning: "People are different. . . . The ultimate diagnosis is based on a combination of the adaptive skills and the intellectual function." Defendant's SMF ¶ 15; Plaintiff's Opposing SMF ¶ 15. Two experts, Drs. Ballenger and Voss, have opined that Farrington is substantially limited with respect to learning. Plaintiff's Additional SMF ¶ 190; Ballenger Dep. at 44-46; Voss Dep. at 70.[27] Dr. Zellinger stated, "His preference for job tasks that involve a single, repetitive task is consistent with a mild range of mental retardation." Plaintiff's Additional SMF ¶ 192; Defendant's Reply SMF ¶ 192.

Dr. Zellinger assigns Farrington grade equivalents of 5.8 for Broad Reading, 4.7 for Basic Reading Skills and 3.3 for Word Attack. Defendant's Reply SMF ¶ 193; Zellinger Dep. Exh. 4, Tab 15A to BIW Exhibits/Vol. I, at 7. Overall, Farrington places between the 5th and 10th percentile of the population in reading. Plaintiff's Additional SMF ¶ 194; Zellinger Dep. Exh. 4 at 7. According to Dr. Zellinger's tests, Farrington's broad written language skills are the equivalent of those of a

summary judgment, I accept Farrington's assessment of his abilities as true.

[27] Farrington's further statement that Dr. Zellinger was of the same opinion, *see* Plaintiff's Additional SMF ¶ 190, is neither admitted nor supported by the citation given.

second-grader, placing him overall in the 0.3 percentile. Plaintiff's Additional SMF ¶ 195; Zellinger Dep. Exh. 4 at 7.[28]

Dr. Voss and Gary M. Namie, Ph.D., a social psychologist, believe that Farrington was harassed because of his disability or perceived disability. Plaintiff's Additional SMF ¶ 207; Voss Dep. at 70-71; Deposition of Gary M. Namie, Ph.D., Tab 2 to Plaintiff's Documents, at 68, 82.[29] Dr. Voss testified:

> Yes[,] I believe Brian Farrington stands out. He would appear to many to be quite limited. To most people, I think his limits are obvious. He has a little speech defect. I believe he was probably victimized in school by other kids, and I believe that same process continued in his job.

Plaintiff's Additional SMF ¶ 209; Defendant's Reply SMF ¶ 209.[30]

BIW has anti-discrimination policies and procedures. Defendant's SMF ¶ 112; Plaintiff's Opposing SMF ¶ 112. These policies and procedures are posted for all employees to see and are disseminated to all employees. *Id*.[31]

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[28] Farrington's further statement that "[b]y virtue of his impaired intellectual functioning, [he] cannot perform any type of work or work in an office environment," Plaintiff's Additional SMF ¶ 198, is disregarded inasmuch as it is neither admitted nor fairly supported by the citations given.

[29] Farrington's further statement that Dr. Ballenger shared this opinion, *see* Plaintiff's Additional SMF ¶ 207, is disregarded inasmuch as it is neither admitted nor supported by the citation given.

[30] BIW states that a number of Farrington's co-workers and supervisors had no knowledge of his alleged mental disability, did not regard him as mentally disabled and/or did not harass him because he was mentally retarded or slow. *See* Defendant's SMF ¶¶ 53-58, 89-90. However, for purposes of summary judgment, I view the record in the light most favorable to Farrington.

[31] BIW's further statement that "Farrington did not report alleged instances of harassment prior to October 27, 1999, and therefore did not avail himself of the protections of BIW's anti-discrimination policies and procedures," Defendant's SMF ¶ 113, is effectively controverted by Farrington, *see* Plaintiff's Opposing SMF ¶ 113; Farrington Dep. at 237-38, 241-42, whose version of events I credit for purposes of summary judgment.

III. Analysis

In the two counts of his complaint surviving BIW's previously decided motion to dismiss, Farrington alleges that BIW subjected him to a hostile working environment based on his mental disability and/or perceived mental disability, thereby violating the ADA and the Rehabilitation Act. Complaint ¶¶ 16-21, 40-41.

As BIW notes, S/J Motion at 3-4, the First Circuit has assumed without deciding that hostile work environment claims may be brought pursuant to the ADA, *see, e.g., Rivera-Rodríguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 23-24 (1st Cir. 2001).[32] To make out such a claim, a plaintiff must establish that (i) he or she is "disabled" for purposes of the ADA; (ii) he or she was subjected to unwelcome harassment, (iii) the harassment was based on disability, (iv) the harassment was sufficiently severe to alter conditions of his or her employment and create an abusive working environment, (v) the conduct in question both offended the plaintiff and would offend a reasonable person and (vi) some factual basis exists for imputation of liability to the employer. *See Bailey v. Georgia-Pacific Corp*., 306 F.3d 1162, 1166-67 (1st Cir. 2002) (ADA definition of "disability"); *O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (elements of hostile work-environment claim).

BIW's motion tests nearly every link in this chain. *See, e.g.*, S/J Motion at 1. To the extent the links hold, BIW seeks relief from any potential liability for punitive damages. *Id*. at 20. Farrington successfully resists the attack, demonstrating the existence of genuine, trialworthy issues as to all points raised.

[32] The parties agree that ADA analysis is dispositive of Farrington's Rehabilitation Act claim. *See* S/J Motion at 3 n.1; Plaintiff's Opposition to Bath Iron Works' Motion for Summary Judgment ("S/J Opposition") (Docket No. 28) at 7 n.1.

A. Disability

The ADA proscribes discrimination by a covered entity "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

"Disability," in turn, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Relevant federal regulations define a "mental impairment" as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(j)(2)(i); 29 C.F.R. § 1630.2(h)(2).

As an initial matter, BIW contests that Farrington has a mental impairment. *See* S/J Motion at 6-8. However, Farrington adduces cognizable evidence that he has been diagnosed as suffering from mild mental retardation or, alternatively, borderline intellectual functioning. At least one circuit court of appeals has flatly held that "medically diagnosed mental conditions are impairments under the ADA." *Krocka v. City of Chicago,* 203 F.3d 507, 512 (7th Cir. 2000) (citation and internal punctuation omitted). In any event, even were this not the case, mental retardation is expressly listed as a "mental impairment" in the relevant regulations. Farrington's condition qualifies as an "impairment" for purposes of the ADA.

BIW next argues that, even assuming *arguendo* the existence of a mental impairment, Farrington fails to raise a triable issue whether his impairment substantially limits a major life activity. *See* S/J Motion at 8-12. Farrington alleges that he is substantially limited in five major life activities – working, learning, thinking, reading and writing. *See* Complaint ¶ 18. He need only

generate a triable issue with respect to one of these to keep his claims afloat, *see* 42 U.S.C. § 12102(2)(A); however, BIW alternatively seeks to narrow the field of triable issues. *See* BIW's Reply to Farrington's Opposition to Defendant's Motion for Summary Judgment ("S/J Reply") (Docket No. 44) at 4-9. I therefore address all five, determining that Farrington raises triable issues with respect to three (learning, reading and writing), that one (thinking) should be folded into the major life activity of learning, and that Farrington falls short of demonstrating a triable issue as to the remaining one (working).

1. **Learning.** BIW concedes that "learning" constitutes a "major life activity." *See* S/J Motion at 9; *see also, e.g., Whitney v. Greenberg, Rosenblatt, Kull & Bistoli, P.C.*, 258 F.3d 30, 34 (1st Cir. 2001). However, it contends that Farrington fails to adduce sufficient evidence to raise a triable issue whether his impairment substantially limits his ability to learn. *See* S/J Motion at 9. I disagree.

An individual is considered substantially limited in a major life activity to the extent, *inter alia*, that he or she is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii).

Farrington adduces sufficient evidence to raise a triable issue whether his ability to learn is significantly restricted compared with that of the average person, including: (i) the expert opinions of Drs. Ballenger and Voss that his ability to learn is substantially limited, (ii) testing results placing him below the 1st percentile for broad written language skills and in the 5th to 10th percentile for reading skills, (iii) his preference for simple, repetitive jobs and (iv) his seemingly great difficulties learning the task of assembling footboards and headboards. *See Walsted v. Woodbury County, Iowa*,

113 F. Supp.2d 1318, 1329 (N.D. Iowa 2000) (plaintiff's evidence that she had trouble keeping up in school, was only able to write name, address and a few simple words, had difficulty reading, had difficulty learning job duties as quickly as her co-workers and tested in the borderline mentally retarded range sufficient to survive summary judgment on whether she was substantially restricted in major life activity of learning). BIW hence fails to demonstrate entitlement to summary judgment with respect to that portion of Farrington's claim based on asserted substantial limitation in the major life activity of learning.

2. **Thinking.** Farrington cites several cases in support of the proposition that this court should recognize "thinking" as a discrete major life activity, among them *Mulholland v. Pharmacia & Upjohn, Inc*., 52 Fed. Appx. 641 (6th Cir. 2002). *See* S/J Opposition at 12-13. As BIW points out in its reply, the *Mulholland* court treated "thinking" as a subset of "learning." *See* S/J Reply at 5; *Mulholland*, 52 Fed. Appx. At 645. The First Circuit has held such a telescoping permissible. *Whitney*, 258 F.3d at 33 n.4 ("Whitney takes exception to the district court's telescoping under the rubric of working and learning other asserted major life activities, namely: thinking, concentrating, organizing data, processing information, interacting with others, and performing other everyday tasks such as sleeping and driving at night. Even if each of these is a distinct major life activity, we agree with the district court that all may be reasonably subsumed within the broader context of working and learning."). Inasmuch as Farrington's arguments concerning thinking and learning substantially overlap, *see* S/J Opposition at 11-13, it is appropriate in this case to subsume "thinking" into what the First Circuit has termed the "broader context of learning."

3. **Reading and Writing.** BIW observes (correctly, according to my own research) that the First Circuit has yet to consider whether reading and writing constitute "major life activities" for purposes of the ADA. *See* S/J Motion at 10. However, as BIW acknowledges, other courts have

held that they do. *See id*.; *see also, e.g., Bartlett v. New York State Bd. of Law Exam'rs*, 226 F.3d 69, 80 (2d Cir. 2000) (reading); *Gonzales v. National Bd. of Med. Exam'rs*, 225 F.3d 620, 626 (6th Cir. 2000) (reading, writing); *Walsted*, 113 F. Supp.2d at 1329 (reading). BIW offers no compelling argument why the First Circuit would choose to blaze a different trail. *See* S/J Motion at 10-12. Accordingly, I see no reason not to classify reading and writing as major life activities. As to both, Farrington adduces sufficient evidence to raise triable issues whether his abilities are significantly compromised compared with those of the average person, including (i) (most notably) testing results placing him below the 1st percentile for broad written language skills and in the 5th to 10th percentile for reading skills and (ii) his own testimony that he is unable to engage in any significant written communication. BIW's bid for summary judgment as to that portion of Farrington's claim hinging on his reading and writing abilities accordingly should be denied.[33]

4. **Working.** Farrington relies on a sole factual proposition – that he is incapable of performing office or professional work – to generate a triable issue with respect to the asserted major life activity of working.[34] *See* S/J Opposition at 16-17. However, the statement in question is not cognizable inasmuch as it is not supported by the citations given. In any event, even were the statement cognizable, it would not suffice. A plaintiff must make a "weighty showing" to prove that an impairment substantially interferes with his or her ability to work; "[p]roof that one is limited in the ability to perform either a class or broad range of jobs would usually entail evidence concerning the accessible geographic area, the numbers and types of jobs in the area foreclosed due to the

[33] BIW posits, without citation to authority, that Farrington's test scores, standing alone, do not suffice to show disability. *See* S/J Reply at 7. I fail to see how test scores like Farrington's would not, at a minimum, raise a triable issue whether a plaintiff was significantly limited in the activities of reading and writing. In any event, Farrington does adduce additional cognizable evidence of impairment.

[34] The First Circuit has assumed, without deciding, that "working" constitutes a "major life activity" for purposes of the ADA, although it has noted that there is some doubt whether the Supreme Court ultimately will so hold. *See, e.g., Bailey*, 306 F.3d at 1168 n.5.

impairment, and the types of training, skills, and abilities required by the jobs." *Bailey*, 306 F.3d at 1168; *see also, e.g., Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1998) (plaintiff generated triable issue whether substantially limited in ability to work on basis, *inter alia*, of affidavit of vocational expert stating that she "would have been precluded from performing not only many of the available jobs in service-producing industries, (including transportation, wholesale/retail, finance, real estate, hospitality industries, medical services, and professional services), which made up 83% of the 41,000 non-agricultural jobs in [her] county of residence, but also most of the jobs in the goods-producing industries (contract construction, mining, and manufacturing), which comprised the remaining 17% of available positions."). Farrington proffers no such evidence. He accordingly fails to generate a triable issue as to whether his disability substantially limits his ability to work.

B. Perceived Disability

The Supreme Court has well-summarized the framework for the next question posed – whether Farrington generates a triable issue that he was perceived as disabled:

> There are two apparent ways in which individuals may fall within this statutory definition [of perceived disability]: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

Farrington adduces evidence that:

1. He was repeatedly called by co-workers and even on some occasions by supervisors "dumb," "stupid," "retard" and "loser."

2. As he struggled to assemble footboards and headboards, co-workers would begin to scream: "Put it together, take it apart." One supervisor laughed.

3. His work station was moved in front of the supervisor's office. Although BIW offers an explanation (that a co-worker had complained about Farrington's radio), a trier of fact reasonably could infer that the move was effectuated at least in part because Farrington was perceived as unable to accomplish tasks without close supervision.

4. Co-workers posted and/or disseminated doctored photographs depicting him with a penis in his mouth, kissing a monkey and with his head superimposed on the body of a monkey. One could draw a reasonable inference that a unifying theme of this graffiti was that Farrington was abnormal, even sub-human.

5. No other co-worker was subjected to this volume of "practical jokes."

6. Per Dr. Voss, Farrington stood out and would "appear to many to be quite limited. . . . [H]e probably was victimized in school by other kids, and . . . that same process continued in his job."

This suffices to generate a triable issue whether Farrington was perceived as substantially limited in certain abilities (for example, learning) as a result of mental impairment.

C. "Unwelcome" Harassment

BIW next argues that Farrington was not subjected to unwelcome harassment, citing to its voluminous evidence that Farrington initiated or gleefully participated in most of the "horseplay." *See* S/J Motion at 14-15. The problem for BIW is that Farrington effectively controverts this evidence. A trier of fact crediting Farrington's version of events could find that (i) he continually was hazed, (ii) he did not initiate most, if any, of the hazing, (iii) he found the conduct in question

offensive and (iv) a reasonable person would find such conduct offensive. A fact-finder must sort out whether the conduct in issue was unwelcome.

D. "Severe" Harassment

BIW also seeks summary judgment on the basis that the "overwhelming evidence" demonstrates that the conduct of which Farrington now complains was not sufficiently severe or pervasive to be actionable. *See id*. at 15-17.

A plaintiff proves the existence of a hostile work environment by showing that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted). "[The] conduct must be extreme to amount to a change in the terms and conditions of employment;" the standard is "sufficiently demanding to ensure that Title VII does not become a general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citations and internal quotation marks omitted). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)" are not sufficient. *Id*. (citation and internal quotation marks omitted). "Properly applied, [these standards] will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id*. (citation and internal quotation marks omitted).

Farrington, once again, counters BIW's "overwhelming evidence" with his own. This includes evidence that (among other things) co-workers (i) posted or disseminated doctored, derogatory photographs of him, (ii) continuously taunted him, calling him "loser," "dumb" "retarded" and so forth and screaming "put it together, take it apart" when he encountered difficulty assembling headboards and footboards and (iii) beat him with sticks or pipes on a nearly daily basis,

sometimes drawing blood or raising welts. Farrington's evidence, if credited (as it must be on summary judgment), paints a nightmarish portrait of unremitting, cruel abuse, far beyond anything that reasonably could be considered the "ordinary tribulations of the workplace." BIW's bid for summary judgment on this basis accordingly should be denied.

E. Disability-Based Harassment

BIW next asserts that Farrington fails to generate a triable issue that the harassment he allegedly experienced was based on disability or perceived disability. *See* S/J Motion at 15-17. This is so, in BIW's view, given its voluminous evidence that Farrington instigated most of the "horseplay," enjoyed it and did not contemporaneously report that he was being beaten or otherwise harassed. *See id*. However, Farrington effectively controverts that evidence, depicting a workplace in which he (i) was repeatedly called "dumb," "stupid," "loser" and similar epithets, (ii) was taunted when he had difficulty assembling headboards and footboards with chants of "put it together, take it apart," (iii) was depicted in doctored photographs distributed or posted at work as a monkey and as marrying a monkey and (iv) bore the brunt of workplace "practical jokes." A trier of fact crediting this testimony reasonably could infer that Farrington was either known or perceived to be significantly "slower" than average and that this perception was the driving force behind the torrent of abuse. Farrington accordingly survives summary judgment as to this link in the chain.

F. Employer Liability

BIW next asserts that Farrington fails to adduce sufficient evidence to establish employer liability for the alleged harassment. *See* S/J Motion at 17-19. Farrington's complaint implicates two types of actionable hostile work environment: those created by supervisors and those created by co-workers. *See, e.g.,* Complaint ¶ 12.

"As a general rule, an employer is vicariously liable for an actionable hostile work environment created by a supervisor." *Marrero v. Goya of Puerto Rico, Inc*., 304 F.3d 7, 20 (1st Cir. 2002). Nonetheless, in cases in which no "tangible employment action" has been taken, an employer may yet escape such vicarious liability by means of the so-called "*Faragher/Ellerth*" affirmative defense. *Id*. at 20-21 & n.3 (citing *Faragher*, 524 U.S. at 781, 807-08; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 765 (1998)). As the First Circuit has clarified:

> The *Faragher*/*Ellerth* affirmative defense has two necessary elements, and the employer bears the burden of proof as to both. First, the employer must show that it exercised reasonable care to prevent and correct promptly any . . . harassing behavior. That requirement typically is addressed by proof that the employer had promulgated an anti-harassment policy with a complaint procedure. Second, the employer must establish that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. That prong is usually addressed by proof that the plaintiff unreasonably ignored an established complaint procedure.

Id. at 20-21 (citations, footnote and internal punctuation omitted).

To the extent the harassment is caused by co-workers, "the employer is liable if it knew or should have known of the charged . . . harassment and failed to implement prompt and appropriate corrective action." *White v. New Hampshire Dep't of Corr.*, 221 F.3d 254, 261 (1st Cir. 2000) (citation and internal quotation marks omitted).[35]

BIW posits that Farrington cannot make out a *prima facie* case that his supervisors either created, knew or should have known about the alleged hostile working environment. *See* S/J Motion at 17-18. Alternatively, BIW seeks shelter in the *Faragher/Ellerth* defense. *See id*. at 18-19. Farrington rejoins, *inter alia*, that BIW waived the *Faragher/Ellerth* defense by failing to raise it in its amended answer. *See* S/J Opposition at 25-26.

[35] The *Faragher/Ellerth* defense is available only to negate vicarious liability for harassment by supervisors. *See, e.g., Swinton v. Potomac Corp*., 270 F.3d 794, 803 (9th Cir. 2001).

Normally, the raising of an affirmative defense for the first time in the context of summary judgment would indeed constitute a waiver. *See, e.g., McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996) ("To avoid waiver, a defendant must assert all affirmative defenses in the answer.") (citing Fed. R. Civ. P. 8(a)). However, in this case BIW did assert something approximating a *Faragher/Ellerth* defense – that "Plaintiff's claims are barred because he did not report the incidents to BIW." *See* Defendant's Amended Answer to Plaintiff's First Amended Complaint and Demand for Jury Trial (Docket No. 23) at 13 (22d affirmative defense). In addition, BIW adduces evidence that plaintiff's counsel knew that this defense might be asserted. *See* Letter dated October 21, 2002 from Jeffrey Neil Young, Esq. to Tracey G. Burton, Esq. and Jeffrey W. Peters, Esq., attached as Exh. A to S/J Reply, at 4. Under the circumstances, I decline to hold the defense waived. *See, e.g., Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir. 1995) ("Where, as here, a plaintiff clearly anticipates that an issue will be litigated, and is not unfairly prejudiced when the defendant actually raises it, a mere failure to plead the defense more particularly will not constitute a waiver.")

Nonetheless, this ruling does not save the day for BIW on summary judgment. On the co-worker harassment front, Farrington adduces sufficient evidence to raise a triable issue whether supervisors knew of the alleged harassment but failed to take prompt, reasonable measures to correct it. This includes evidence that Farrington complained to supervisors Ater and Lally to no avail and that supervisor LeClair encouraged one co-worker to carry on beating Farrington and laughed when others screamed, "put it together, take it apart."

On the supervisory harassment front, Farrington raises a triable issue whether supervisor LeClair himself harassed him, for example, by taunting him with epithets and striking him with a mallet or hammer on one occasion. BIW, which bears the burden of proving the *Faragher/Ellerth*

defense, fails to show conclusively, for purposes of summary judgment, that Farrington unreasonably failed to take advantage of corrective measures it offered.

For these reasons, BIW's efforts to win summary judgment on the employer-liability prong of Farrington's hostile-work-environment claim fall short.

F. Punitive Damages

To recover punitive damages in the context of an ADA claim, a plaintiff must show that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Marcano-Rivera v. Pueblo Int'l, Inc*., 232 F.3d 245, 253 (1st Cir. 2000) (citation and internal quotation marks omitted). As the First Circuit has observed:

> [T]he terms "malice" or "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. This means that an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages. . . . [However,] an employer may not be held liable in punitive damages for the acts of its employees or agents when those acts are contrary to the employer's good faith efforts to comply with the law.

Id. at 254 (citations and internal quotation marks omitted).

"[A] written non-discrimination policy is one indication of an employer's efforts to comply with [the law]." *Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000). "But a written statement, without more, is insufficient to insulate an employer from punitive damages liability. A defendant must also show that efforts have been made to implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate." *Id*. (citations omitted).

BIW contends it is entitled to summary judgment as to punitive damages inasmuch as (i) it made good-faith, diligent efforts to comply with the law, (ii) there is no evidence of "evil motive" on its part and (iii) although the "horseplay" at EBMF was contrary to BIW rules and standard

procedures, there is no trialworthy issue that Farrington worked in a discriminatory hostile environment. S/J Motion at 20.

For the reasons discussed above, Farrington raises trialworthy issues whether he worked in a hostile environment and whether BIW made good-faith, diligent efforts to comply with the law. There is no dispute that BIW created and disseminated anti-harassment policies; however, Farrington's evidence as a whole raises a triable issue whether it actively enforced those policies' mandate. BIW accordingly fails to demonstrate entitlement to summary judgment as to possible punitive-damages liability.

G. Laches, Estoppel, Waiver

BIW argues finally, for the first time in its reply memorandum, that it is entitled to summary judgment on the basis of laches, estoppel or waiver with respect to three alleged incidents of harassment. *See* S/J Reply at 16-17. Two of the incidents (taping Farrington to a chair and urinating in his hardhat) were mentioned in the MHRC charge appended to Farrington's complaint. *See* Charge of Discrimination, Exh. A to Complaint, at 2. The third (setting Farrington on fire) emerged at deposition. *See* S/J Reply at 17. BIW filed its motion for summary judgment on November 27, 2002. *See* S/J Motion at 1. Prior thereto, on November 8, 2002, it sought leave to amend its answer to add the defenses of laches, estoppel and waiver. *See* Bath Iron Works Corporation's Motion To Amend Its Answer, etc. (Docket No. 16) at 1. This motion was granted subsequent to the filing of BIW's summary judgment motion, on December 10, 2002. *See* Endorsement to *id*. However, BIW was aware of the three incidents in question and could conditionally have raised its laches/estoppel/waiver arguments in its initial motion for summary judgment or, alternatively, could have sought leave to file a supplemental motion for summary judgment, thereby affording Farrington an opportunity to respond. It did not do so. I decline to consider the argument as presented. *See*

Loc. R. 7(c) (noting that a reply memorandum "shall be strictly confined to replying to new matter raised in the objection or opposing memorandum"); *In re One Bancorp Sec. Litig*., 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument raised for the first time in a reply memorandum).

IV. Conclusion

For the foregoing reasons, I **GRANT** Farrington's motion to strike, **GRANT** in part and **DENY** in part BIW's motion to strike and recommend that BIW's motion for summary judgment be **DENIED**, with the caveat that Farrington be precluded at trial from claiming disability premised on asserted substantial restriction in his ability to work.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of February, 2003.

David M. Cohen
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-274

FARRINGTON v. BATH IRON WORKS — Filed: 11/16/01
Assigned to: JUDGE D. BROCK HORNBY — Jury demand: Both
Demand: $300,000 — Nature of Suit: 442
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 29:791 Job Discrimination (Rehabilitation Act)

BRIAN FARRINGTON
plaintiff

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v.

BATH IRON WORKS
defendant

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